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MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-636

MICHAEL PELLICCI,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOSEPH J. BALLIRO
65 East India Row, 30F
Boston, Massachusetts 02110

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UNITED STATES OF AMERICA,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered in the above-entitled case on October 24, 1974.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is not yet reported but is annexed hereto as Appendix A, commencing at page 14.

Judgments Below

The judgment of the United States District Court for the District of Massachusetts was entered on June 14, 1974.

The judgment of the Court of Appeals for the First Circuit was entered on October 24, 1974 and is annexed hereto as Appendix B, commencing at page 18.

Jurisdiction

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. 1254(1) and Rule 22(2).

The judgment sought to be reviewed is dated and was entered October 24, 1974.

Questions Presented

I. Whether the Function of the Attorney General Under Title 18, U.S.C. 2516, of Authorizing Wiretaps and Electronic Surveillances May Be Assumed by an Individual Who Is Not "Politically Responsible" Since He Has Not Been Appointed With the Advice and Consent of the United States Senate But He Succeeds to the Office of Acting Attorney General Pursuant to Title 28, U.S.C. 508(b)?

II. Whether the Designation by Way of Job Title Rather than Individual Name Failed to Conform With the Specificity Required by Title 18, U.S.C. 2516?

III. Whether the Authorization to Conduct Electronic Intereceptions Is Defective on Its Face in that It Does Not Appear That the Person Who Approved of the Application for Electronic Surveillance Was the Special Designee of Acting Attorney General Bork?

Statutes involved

18 U.S.C. 2516 (1)

(1) The Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge may grant in conformity with section 2518 of this chapter an order authorizing or approving the interception of wire or oral communications by the Federal Bureau of Investigation, or a Federal agency having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of—: . . .''

28 U.S.C. 508

(a) In case of a vacancy in the office of Attorney General, or of his absence or disability, the Deputy Attorney General may exercise all the duties of that office . . .

(b) When by reason of absence, disability, or vacancy in office, neither the Attorney General nor the Deputy Attorney General is available to exercise the duties of the office of Attorney General, the Assistant Attorneys General and the Solicitor-General in such order of succession as the Attorney General may from time to time prescribe, shall act as Attorney General.

28 CFR 0.132(a)

(a) In case of vacancy in the office of Attorney General, the Deputy Attorney General shall, pursuant to 28 U.S.C. 508, perform the functions and duties of and act as Attorney General; and in case of vacancy in both the office of Deputy Attorney General, the Solicitor General

shall perform the functions and duties of and act as Attorney General.

5 U.S.C. 301

The head of an Executive Department or Military Department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property. This section does not authorize withholding information from the public or limiting the availabilty of records to the public.

18 U.S.C. 2518(10)(a)

Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that—

(i) the communication was unlawfully intercepted;

(ii) The order of authorization or approval under which it was intercepted is insufficient on its face; . . .

18 U.S.C. 1955

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section —

(1) "illegal gambling business" means a gambling business which —

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day . . .

Statement of the Case

A. *The Proceedings Below*

Petitioner was charged in a one-count indictment filed in the United States District Court for the District of Massachusetts on January 23, 1974 with conducting an illegal gambling enterprise in violation of 18 U.S.C. 1955. A jury was initially empaneled on May 28, 1974, and commenced to hear the case, but petitioner waived jury trial on May 31, 1974, and the prosecution was concluded before the District Court Judge. Petitioner was adjudged guilty, sentenced to five years imprisonment, and fined $20,000. Petitioner's application for bail pending appeal was denied on June 4, 1974 by the United States Court of Appeals for the First Circuit, which affirmed the judgment of the District Court on October 24, 1974.

B. *Statement of Facts*

In February, 1974, a grand jury sitting in the United States District Co in the District of Massachusetts returned a one-coun indictment against the petitioner, charging him with a gaming violation proscribed by 18

U.S.C. 1955. A judgment of conviction was entered on June 14, 1974, and the petitioner was sentenced to the maximum term provided by law: a five-year term of imprisonment and a $20,000 fine.

Prior to the commencement of trial the petitioner duly filed a motion to suppress evidence pursuant to the provisions of 18 U.S.C. 2518(10)(a), alleging therein that evidence against him had been obtained as the result of an illegal and improper electronic surveillance. The motion was denied.

Reasons for Granting the Writ

The reasons proposed by petitioner for granting the writ will be stated under each of the headings relating to the respective questions presented.

I. The Acting Attorney General Who Succeeded to that Office Through Title 28, U.S.C. 508(b) May Not Exercise the Extraordinary Duties Regarding Authorization of Wiretap and Electronic Surveillance Since His Appointment Was Not With the Advice and Consent of the Senate.

The question posed by this petition seeks further definition of the mandate in Title 18, U.S.C. 2516(1) regarding authorization of wiretap and electronic surveillance. The question deals specifically with wiretaps authorized during the period when this nation was without an attorney general and deputy attorney general following the resignations of Mr. Richardson and Mr. Ruckelshaus. Although the question represents a narrow application of the ruling in *United States* v. *Giordano*, —— U.S. ——, 40 L. Ed.2d 341 (1974), it has far reaching implications since, if an-

swered affirmatively, countless wiretaps and electronic surveillances conducted during this period of Mr. Bork's tenure as Acting Attorney General will be illegal, and the taint may reach to numerous wiretaps and electronic surveillances conducted since. Undoubtedly, an early and definitive disposition of this issue will serve the interest of justice by curtailing protracted litigation on this question.

The United States Court of Appeals for the First Circuit has taken a pragmatic approach to the question after noting that if petitioner's argument were accepted ". . . it would place this Court in the impossible position of trying to determine which powers Bork succeeded to and which he did not." (*United States* v. *Pellicci*, slip opinion p. 3, Appendix A, p. 16) The Court of Appeals' approach is overly concerned with hypothetical litigation and fails to fully grasp the petitioner's question in light of *Giordano*; which question was the only one before the Court.

As this Court recognized in *United States* v. *Giordano*, —— U.S. ——, 40 L.Ed.2d 341 (1974), Congress intended that wiretaps and electronic surveillance would suffer the tightest control, and though the Attorney General pursuant to Title 28, U.S.C. 510 may delegate the performance of his general duties to any other officer, employee or agency of the Department of Justice, the use of wiretaps is so threatening that the authorization of applications for wiretaps may not be freely delegated. In *Giordano* this Court emphasized ". . . that the authority to apply for court orders is to be narrowly confined . . ." and "that it is to be limited to those responsive to the political process . . ." 40 L.Ed.2d at 356.

Of course, *Giordano* was concerned with categorizing an "executive assistant" as one not responsive to the political process. It would be too simplistic, however, to argue that because Mr. Bork's appointment as a Solicitor-

General came about with the advice and consent of the Senate that he was a "politically responsive" person within the meaning of *Giordano*. Such a view would ignore the obvious concern manifested by Congress in the lengthy hearing and arguments that ultimately resulted in the passage of Title III, a concern that the one yielding this mighty power might hold views regarding personal liberties not consonant with those who in the Senate have the power to confirm. Mr. Bork was never intended by the President to be the Attorney General of the United States. His confirmation, as a Solicitor-General, was far removed from the kind of examination he would undergo as a nominee for Attorney General — an inquiry that would have given some insight as to his views on electronic surveillances.

In short, Bork never made any commitment to the Senate, in a politically responsive manner, within the meaning of *Giordano*, nor was it intended that he would ever have to.

Bork's succession came about through 28 CFR 0.132(a) "Designating official to perform the function and duties of certain offices in case of vacancy therein" which provides for the Solicitor-General (in this case Mr. Bork) to assume the "functions and duties" in the absence of both the Attorney General and Deputy Attorney General. The legality of Bork's succession is not questioned, but the scope of his authority is. Under *Giordano* the Attorney General could not delegate the authorization function under § 2516 to anyone but an Assistant Attorney General, a "politically responsible" individual, and we question whether through the order of succession as promulgated by the Attorney General under Title 28, U.S.C. § 508 the mandate of § 2516 may be avoided.

The instant question seeks a determination of whether the succession procedures authorized by Title 28, U.S.C.

§ 508 are modified by Title 18, U.S.C. § 2516 to allow the Acting Attorney General to assume all the functions of that office *except* those which only may be performed by a "politically responsible" officer.

The extraordinary nature of the authorization function caused Congress to restrict the normal powers of delegation under Title 5, U.S.C. §301, and, we submit, caused Congress to restrict the succession and assumption of this particular function by an Acting Attorney General under Title 28, U.S.C. § 508(b).

Further, it should be noted that although 28 CFR 0.132(a) provides that the "Soliciter-General shall perform the functions and duties of and act as Attorney General", it fails to note that the "Solicitor-General" assuming the office of Attorney General pursuant to said section has the authority to exercise "all the duties of that office". In this latter regard there seems to be a meaningful distinction between the power given to a "Solicitor-General" who assumes the role of Attorney General pursuant to 28 U.S.C. 508(a), providing in pertinent part:

> "(a) In case of a vacancy in the office of Attorney General or of his absence or disability, the Deputy Attorney General may exercise *all the duties of that office...*" (emphasis added)

It seems equally clear that Congress intended to put a "Deputy Attorney General" in a different category than that of an "Assistant Attorney General and the Solicitor-General," as witness the difference in language between 28 U.S.C. 508(a) from that of 28 U.S.C. 508(b).

It would appear that the only decided case in which an analogous issue has been raised is *United States* v. *Lucido*, 15 CRL 2088 (USDC E. Mich. March 22, 1974).

In that case the District Court approved of the authority exercised by Acting Attorney General Kleindienst in approving of an application for a wire tap. There is a major difference, however, in the role assumed and the power that could be exercised by Mr. Kleindienst as compared to the instant case. That difference comes about by virtue of the fact that Mr. Kleindienst's authority, at the time he approved of the wire tap, was based upon his assumption of the Attorney General's duties pursuant to the provision of 28 U.S.C. 508(a), which specifically provides, as previously noted, that the Deputy Attorney General may assume "all" the duties of that office. Mr. Bork's accession to power is pursuant to 28 U.S.C. 508(b) that, as previously noted, carries no such language.

Even if we were to assume, argumentatively, that Congress meant something that it did not say and that, therefore, a Solicitor-General fell within the purview of 28 U.S.C. 508(a) and could exercise "all" the duties of that office, the Supreme Court has significantly held that the awesome power of approving electronic surveillances cannot be found in any sweeping designation of authority and must be rooted in strict adherence to the Statute.

II. The Special Designation by Way of Job Title Rather Than to a Named Individual Failed To Conform With the Specificity Required by 18 U.S.C. 2516.

On October 23, 1973 by way of Order No. 548-73 Acting Attorney General Bork, in an attempt to comply with the provisions of 18 U.S.C. 2516, specially designated ". . . the Assistant Attorney General in charge of the Criminal Division to exercise the power conferred by Section 2516 of Title 18, U.S.C., to authorize applications to a Federal judge of competent jurisdiction for orders authorizing the interception of wire or oral communications . . ."

18 U.S.C. 2516(1) provides in pertinent part that

> "the Attorney General, or any Assistant Attorney General specially designated by the Attorney General, may authorize . . ."

We submit that to "specially designate" a job title in lieu of a named individual is a far cry from the obvious intention of Congress and the purport of both the *Giordano* and *Chavez* decisions that the power to approve of an application for electronic surveillance be not only in the hands of a readily identifiable person but also be delegated in a manner that makes clear that the Attorney General entrusted this power to one who would treat it in a manner consonant with the views of the power giver. Apart from the obvious fact that at any given time it might be difficult to determine who is "in charge" of the Criminal Division because of the vagrancies of health, vacations, resignations or the like, it can be readily ascertained that an administrative order, indicating a job title rather than a named person could easily result over the passage of time in the power being assumed by one whose views are far removed from those of the Attorney General making the order. We need not speculate in order to arrive at examples of the inherent confusion that results from specially designating by way of job classification. We need only look at the relevant memoranda in the instant case as a manifestation of that which we now decry.

In the memoranda signed by Henry E. Petersen "Assistant Attorney General Criminal Division" dated 11/27/73 and 12/17/73 respectively, Mr. Petersen recites that ". . . the Acting Attorney General of the United States, the Honorable Robert H. Bork, has by order No. 548-73, dated October 23, 1973, specially designated *me* to authorize applications for court orders authorizing the interception of wire or oral communications . . ." (empha-

sis added) In fact, Mr. Bork did not authorize Henry E. Petersen, nor does it appear in Mr. Petersen's memorandum that he is the Assistant in charge of the Criminal Division. The fact that one has to go outside of the relevant documents to ascertain that Mr. Petersen, on the days he authorized the applications, was in charge of the Criminal Division only serves to highlight that of which we complain. In addition, there is no reference to which we can rely that it was Mr. Petersen who Acting Attorney General Bork specifically intended would wield the power to invade a citizen's privacy. It matters little, we submit, that on the day of the order Mr. Petersen was considered by some to have been in charge of the Criminal Division of the Attorney General's Office. What does matter is that we have here a direct affront to the mandate of both *Giordano* and *Chavez* that requires from the very outset that the record clearly show that the relevant provisions of 18 U.S.C. 2516(1) have been religiously complied with.

III. The Authorization To Conduct Electronic Interceptions Is Defective on Its Face in That It Does Not Appear That the Person Who Approved of the Application For Electronic Surveillance Was the Special Designee of Acting Attorney General Bork.

We have argued to some extent in II above that neither the Order of Acting Attorney General Bork dated October 23, 1973 nor the memoranda signed by Henry Petersen on 11/27/73 and 12/17/73 respectively, clearly indicate who is "in charge of the Criminal Division of the Attorney General's Office." This confusion or, at the very least, the lack of required clarity finds further illustration in the underlining document signed by Kurt Muellenberg "Deputy Chief, Organized Crime and Racketeering Section,Criminal Division". In his letter to the attorney in

charge of the Boston Strike Force, advising that attorney of authorization for him to make application for an order of electronic surveillance, Mr. Muellenberg refers to the authorization as having emanated from ". . . Assistant Attorney General *of* the Criminal Division . . ." Again, not only is there no reference to Mr. Petersen's having been the individual intended by the Order, but there also is no indication or reference that he is an individual "in charge" of the Criminal Division of the Attorney General's Office, a far cry, we submit, from the view that there not be ". . . any loose administration of this law." *United States* v. *Chavez*, 40 L.Ed.2d 380 at 404.

Conclusion

We submit that these issues will continue to present themselves in the future. *Certiorari* should be granted because this case affords an early opportunity to decide these questions, which, if not decided by this Court, will lead to continued litigation. Though these questions deal with a limited number of wiretaps (those under the Acting Attorney General), the use and derivative use of evidence obtained in these wiretaps makes it certain that the issue is not one which will go away if ignored.

By his attorney,

JOSEPH J. BALLIRO
65 East India Row, 30F
Boston, Massachusetts 02110

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 74-1201

UNITED STATES OF AMERICA,

APPELLEE,

v.

MICHAEL PELLICCI,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
McENTEE, *Circuit Judge*,
and CLARY*, *Senior District Judge*.

Joseph J. Balliro for appellant.
Robert Henry Plaxico, Attorney, Department of Justice, with whom *James N. Gabriel*, United States Attorney, *Joel M. Friedman*, Special Attorney, Department of Justice, and *Peter M. Shannon, Jr.*, Attorney, Department of Justice, were on brief, for appellee.

October 24, 1974

PER CURIAM. The appellant was convicted of conducting an illegal gambling enterprise, and appeals on the ground that his motion to suppress evidence obtained through electronic surveillance was improperly denied. The interception of appellant's wire and oral communications had been authorized by a district judge upon application by the government, and the substance of the appeal is the contention that the application was not approved by the Attorney General or his designate as required by 18 U.S.C. § 2516(1).

* Sitting by designation.

Appellant first argues that the application was not in compliance with the statute because it was based upon the authority of Robert H. Bork, Acting Attorney General, rather than upon the authority of an "Attorney General". Section 2516(1) provides that "The Attorney General, or any Assistant Attorney General specifically designated by the Attorney General" may authorize an application. The Attorney General and the Deputy Attorney General having resigned, Bork designated "the Assistant Attorney General in charge of the Criminal Division."

In our view the dispositive statute is 28 U.S.C. § 508(b). Section 508(b) provides that when the offices of the Attorney General and Deputy Attorney General are vacant, and in the case of absence or disability, the Assistant Attorneys General and the Solicitor General "shall act as Attorney General", with the order of their succession determined by departmental regulation. The regulation in force at the time relevant to this case called for the Solicitor General to succeed the Deputy Attorney General. 28 C.F.R. § 0.132(a). Appellant attempts to distinguish the wording of § 508(b) from that of § 508(a), which provides that when there is a vacancy in the office of Attorney General, the Deputy "may exercise all the duties of that office".

There is no basis for concluding that one "acting" as Attorney General has fewer than all the powers of that office. The two subsections of § 508 are not parallel in structure, so the fact that "all" appears in one formulation and not in the other is without import. In reaching this conclusion we also take note of 28 C.F.R. § 0.132(a), which directs that when the offices of Attorney General and Deputy are vacant "the Solicitor General shall perform the functions and duties of and act as Attorney General." The untenable nature of the argument made by appellant becomes apparent in light of the realization

that, if accepted, it would place this court in the impossible position of trying to determine which powers Bork succeeded to and which he did not. Appellant argues that just because Congress took care in § 2516(1) to assign a power specifically to the Attorney General, this is one of the powers Bork did not have. The assumption is apparently that an "acting" Attorney General is vested only with powers not specifically assigned to the Attorney General. Not only would such a concept sharply circumscribe the powers of an official intended by Congress to be a complete substitute for an Attorney General, but there would be no principled basis upon which to effect a division of the powers of the office.

Since we have determined that a Solicitor General acting as Attorney General has no less authority than a Deputy Attorney General who is an Acting Attorney General, the conclusion which we have set out above also draws support from those cases which have held that Richard Kleindienst, a Deputy who was acting Attorney General, could lawfully authorize applications under § 2516. *United States* v. *Lucido*, 373 F. Supp. 1142, 1145 (E.D. Mich. 1974); *United States* v. *Curreri*, 363 F. Supp. 430, 434 (D. Md. 1973).

Appellant's second argument is that even if Bork was empowered to designate under § 2516, the purported designation was not made in the manner required. Specifically, the contention is that the designation of "the Assistant Attorney General in charge of the Criminal Division", omitting the name of the individual holding that office, was impermissibly imprecise. But the designation of a single person accomplished by job title rather than by name does not run afoul of the legislative intent, recognized in *United States* v. *Giordano*, 42 U.S.L.W. 4642, 4647 (U.S. May 13, 1974), that the authority to approve applications be both narrowly confined and limited to those responsive to the

political process. And the fact that Henry E. Petersen, who authorized the application, was by precise title the "Assistant Attorney General of the Criminal Division" in no way calls into question his identity as the individual whom Bork intended to designate.

Affirmed.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 74-1201.

UNITED STATES OF AMERICA,

APPELLEE,

v.

MICHAEL PELLICCI,

DEFENDANT, APPELLANT.

JUDGMENT

Entered October 24, 1974

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

(s) DANA H. GALLUP

Clerk.

[cc: Messrs. Balliro and Plaxico.]